76-7221

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No._____

WILLIAM MICHAEL FIELDS,
Petitioner,

versus

DEKALB COUNTY, GEORGIA,
Respondent,

UNITED STATES OF AMERICA,
Respondent and Third-Party Plaintiff,

versus

MACHINERY BUYERS CORP., and
SOUTHEAST MACHINERY, INC.,
Respondent and Third-Party Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOSEPH CLAUDE FREEMAN, JR.
Attorney for Petitioner

Of Counsel:
FREEMAN & HAWKINS
618 Fulton Federal Building
Atlanta, Georgia 30303

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OPINIONS BELOW

The Opinion of the Court of Appeals en banc is not yet reported. It was an 8-5 opinion reversing a panel opinion of the Court of Appeals of January 30, 1976,

which is reported at 526 F.2d 679. That opinion, in turn, was a reversal of orders of the United States District Court for the Northern District of Georgia, dated June 27, 1974, and September 25, 1974, which had dismissed petitioner's claims against respondent DeKalb County, Georgia. These opinions are all reproduced in the appendix attached hereto, with the en banc opinion of the Court of Appeals, review of which is here sought, appearing first in the appendix at p. 1a.

JURISDICTION

The judgment of the Court of Appeals from which review is sought was rendered on August 25, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether Federal Common Law or state law should be applied to interpret the rights of private citizens to sue as third-party beneficiaries to a Grant Agreement made between a county and the United States of America.

2. Whether private citizens have an implied civil remedy under Federal Aviation Acts for injuries sustained as a result of a breach of safety standards contained in such Acts.

3. Whether Federal Common Law is controlling in all aspects of interpretations of contracts to which the United States of America is a party.

STATUTES INVOLVED

The following Acts and statutes are relevant to the questions presented by this Petition:

"Project applications for airport development

Submission

(a) Subject to the provisions of subsection (b) of this section, any public agency, or two or more public agencies acting jointly, may submit to the Secretary a project application, in a form and containing such information, as the Secretary may prescribe, setting forth the airport development proposed to be undertaken. No project application shall propose airport development other than that included in the then current revision of the national airport system plan formulated by the Secretary under this subchapter, and all proposed development shall be in accordance with standards established by the Secretary, including standards for site location, airport layout, grading, drainage, seeding, paving, lighting, and safety of approaches.

Public agencies subject to State law

(b) Nothing in this subchapter shall authorize the submission of a project application by any municipality or other public agency which is subject to the law of any State if the submission of the project application by the municipality or other public agency is prohibited by the law of that State.

Approval

(c)(1) All airport development projects shall be subject to the approval of the Secretary, which approval may be given only if he is satisfied that—

(A) the project is reasonably consistent with plans (existing at the time of approval of the project) of planning agencies for the development of the area in which the airport is located and will contribute to the accomplishment of the purposes of this subchapter;

(B) sufficient funds are available for that portion of the project costs which are not to be paid by the United States under this subchapter;

(C) the project will be completed without undue delay;

(D) the public agency or public agencies which submitted the project application have legal authority to engage in the airport development as proposed; and

(E) all project sponsorship requirements prescribed by or under the authority of this subchapter have been or will be met.

No airport development project may be approved by the Secretary with respect to any airport unless a public agency or the United States or an agency thereof holds good title, satisfactory to the Secretary, to the landing area of the airport or the site therefor, or gives assurance satisfactory to the Secretary that good title will be acquired.

(2) No airport development project may be approved by the Secretary which does not include provision for the installation of the landing aids specified in subsection (d) of section 1717 of this title and determined by him to be required for the safe and efficient use of the airport by aircraft taking into account the category of the airport and the type and volume of traffic utilizing the airport.

(3) No airport development project may be approved by the Secretary unless he is satisfied that fair consideration has been given to the interest of communities in or near which the project may be located.

(4) It is declared to be national policy that airport development projects authorized pursuant to this subchapter shall provide for the protection and enhancement of the natural resources and the quality of environment of the Nation. In implementing this policy, the Secretary shall consult with the Secretaries of the Interior and Health, Education, and Welfare with regard to the effect that any project involving airport location, a major runway extension, or runway location may have on natural resources including, but not limited to, fish and wildlife, natural, scenic, and recreation assets, water and air quality, and other factors affecting the environment, and shall authorize no such project found to have adverse effect unless the Secretary shall render a finding, in writing, following a full and complete review, which shall be a matter of public record, that no feasible and prudent alternative exists and that all possible steps have been taken to minimize such adverse effect. . . ."

(Pub.L. 91-258, Title I, §16, May 21, 1970, 84 Stat. 226; 1970 Reort. Plan No. 2, eff. July 1, 1970, 35 F.R. 7959, 84 Stat. 2085; Pub.L. 93-44, §4, June 18, 1973, 87 Stat. 89. 49 U.S.C. §1716.)

"Project sponsorship requirements; compliance; contracts between Secretary and public agencies; air traffic control activities; relief of sponsors

As a condition precedent to his approval of an airport development project under this subchapter, the

Secretary shall receive assurances in writing, satisfactory to him, that—

Public use

(1) the airport to which the project for airport development relates will be available for public use on fair and reasonable terms and without unjust discrimination;

Maintenance and operation

(2) the airport and all facilities thereon or connected therewith will be suitably operated and maintained, with due regard to climatic and flood conditions;

Airport hazards

(3) the aerial approaches to the airport will be adequately cleared and protected by removing, lowering, relocating, marking or lighting or otherwise mitigating existing airport hazards and by preventing the establishment or creation of future airport hazards;

Compatible use of adjacent land

(4) appropriate action, including the adoption of zoning laws, has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including landing and takeoff of aircraft;

Government use; charge

(5) all of the facilities of the airport developed with Federal financial assistance and all those usable for

landing and takeoff of aircraft will be available to the United States for use by Government aircraft in common with other aircraft at all times without charge, except, if the use by Government aircraft is substantial, a charge may be made for a reasonable share, proportional to such use, of the cost of operating and maintaining the facilities used;

Air traffic control activities

(6) the airport operator or owner will furnish without cost to the Federal Government for use in connection with any air traffic control activities, or weather-reporting and communication activities related to air traffic control, any areas of land or water, or estate therein, or rights in buildings of the sponsor as the Secretary considers necessary or desirable for construction at Federal expense of space or facilities for such purposes;

Accounting

(7) all project accounts and records will be kept in accordance with a standard system of accounting prescribed by the Secretary after consultation with appropriate public agencies;

Self-sustaining fee and rental structure

(8) the airport operator or owner will maintain a fee and rental structure for the facilities and services being provided the airport users which will make the airport as self-sustaining as possible under the circumstances existing at that particular airport, taking into account such factors as the volume of traffic and economy of collection;

Reports

(9) the airport operator or owner will submit to the Secretary such annual or special airport financial and operations reports as the Secretary may reasonably request; and

Inspection of records

(10) the airport and all airport records will be available for inspection by any duly authorized agent of the Secretary upon reasonable request.

To insure compliance with this section, the Secretary shall prescribe such project sponsorship requirements, consistent with the terms of this subchapter, as he considers necessary. Among other steps to insure such compliance the Secretary is authorized to enter into contracts with public agencies, on behalf of the United States. Whenever the Secretary obtains from a sponsor any area of land or water, or estate therein, or rights in buildings of the sponsor and constructs space or facilities thereon at Federal expense, he is authorized to relieve the sponsor from any contractual obligation entered into under this subchapter or the Federal Airport Act to provide free space in airport buildings to the Federal Government to the extent he finds that space no longer required for the purposes set forth in paragraph (6) of this section."

(Pub.L. 91-258, Title I, §18, May 21, 1970, 84 Stat. 229. 49 U.S.C. §1718.)

"Municipalities, etc., may acquire airports

Municipalities, counties, and other political subdivisions are hereby authorized, separately or jointly, to

acquire, establish, construct, expand, own, lease, control, equip, improve, maintain, operate, regulate and police airports and landing fields for the use of aircraft, either within or without the geographical limits of such municipalities, counties, and other political subdivisions, and may use for such purpose or purposes any available property that is now or may at any time hereafter be owned or controlled by such municipalities, counties, or political subdivisions. All counties in the State of Georgia which are located on the boundary line between the State of Georgia and any other State, as well as all municipalities and other political subdivisions which are located in such boundary counties, are hereby authorized, separately, jointly with each other or jointly with any county, municipality or political subdivision of any such border State, to acquire, establish, construct, expand, own, lease, control, equip, improve, maintain, operate, regulate and police airports and landing-fields for the use of aircraft, either within or without the geographical limits of such border counties and the municipalities and other political subdivisions therein contained in the State of Georgia or within the geographical limits of any county, municipality or political subdivision of any such border State other than the State of Georgia."

(Acts 1933, p. 102; 1941, p. 380. Georgia Code Annotated §11-201.)

"Airport Zoning; things to be considered in adopting or revising

In adopting or revising any such zoning regulations, the political subdivision shall consider, among other things, the character of the flying operations expected

to be conducted at the airport, the nature of the terrain, the height of existing structures and trees above the level of the airport, the possibility of lowering or removing existing obstructions, and the views of the agency of the Federal Government charged with the fostering of civil aeronautics, as to the aerial approaches necessary to safe flying operations at the airport."

(Acts 1946, pp. 121, 123. Georgia Code Annotated §11-405.)

"Parties to actions on contracts

As a general rule, the action on a contract, whether express or implied, or whether by patrol or under seal, or of record, shall be brought in the name of the party in whom the legal interest in such contract is vested, and against the party who made it in person or by agent. The beneficiary of a contract made between other parties for his benefit may maintain an action against the promisor on said contract."

(Acts 1949, p. 455. Georgia Code Annotated §3-108.)

"Right of action to individual for public nuisance

Generally, a public nuisance gives no right of action to any individual. If a public nuisance shall cause special damage to an individual, in which the public do not participate, such special damage shall give a right of action."

(Georgia Code Annotated §72-103.)

STATEMENT OF THE CASE

This action arises from injuries sustained by the plaintiff as the result of the crash of a Lear Jet Model 24 Aircraft N454RN, which occurred in DeKalb County, Georgia, on February 26, 1973. The basic facts assumed to be true for the purposes of this appeal are as follows:

On February 26, 1973, shortly after taking off from DeKalb-Peachtree Airport in DeKalb County, Georgia, and while within the boundaries of the airport, a certain Lear Jet ingested a large number of birds causing a sudden power loss in both engines and the eventual crash and total destruction of said aircraft. Prior to its crash, the aircraft passed over the plaintiff, dousing him with burning jet fuel which resulted in critical injury to the plaintiff. The aircraft crashed a short distance from the plaintiff killing all seven persons on board.

DeKalb County, Georgia, owns and operates DeKalb-Peachtree Airport. DeKalb County, Georgia, further owned and operated an open garbage dump next to one of the airport runways and knew that such dump attracted large flocks of birds, creating a dangerous bird hazard.

Prior to the crash, the United States of America and DeKalb County, Georgia, entered into a number of Grant Agreements pursuant to the Federal Airport and Airway Development Act, 49 U.S.C. §1711, *et seq.*, and such Act's predecessor, the Federal Airport Act, 49 U.S.C. §1110, *et seq.*

DeKalb County failed to comply with several provisions of the Grant Agreement's plan in maintaining the open garbage dump despite assurances by DeKalb

County to the Federal Government that such dump would be closed.

The plaintiff sued DeKalb County, Georgia, the individual commissioners of DeKalb County, H. F. Manget, Jr., American Home Assurance Company, and The United States of America. Plaintiff's Complaint alleges facts supporting liability of DeKalb County on several grounds. It is alleged that the maintenance of an open garbage dump constitutes a public and private nuisance as defined by state law and an airport hazard as defined by federal law. Negligence is alleged in that the County was maintaining a hazardous condition in violation of several statutes and in spite of their knowledge of the existence of such dangerous condition. An additional ground of liability as alleged in the Complaint is that the plaintiff is a third-party beneficiary of the Grant Agreements entered into between DeKalb County and the United States of America. The relevant portions of such agreements are as follows:

> "1. These covenants shall become effective upon acceptance by the Sponsor of an offer of Federal aid for the Project or any portion thereof made by the FAA, and shall constitute a part of the Grant Agreement thus formed. These covenants shall remain in full force and effect throughout the useful life of the facilities developed under this Project, but in any event not to exceed twenty (20) years from the date of said acceptance of an offer of Federal aid for the Project.
>
> 2. *The Sponsor will operate the Airport as such for the use and benefit of the public.* . . . That Sponsor may prohibit or limit any given type, kind, or class of aeronautical use of the Airport if such action is necessary for the *safe operation* of the

Airport or necessary *to serve the civil aviation needs of the public* . . . .

6. The Sponsor will operate and maintain in a *safe* and serviceable condition the Airport and all facilities thereon and connected therewith which are necessary to serve the aeronautical users of the Airport other than facilities owned or controlled by the United States, and *will not permit any activity thereon which would interfere with its use for Airport purposes:* . . .

11. The Sponsor will not enter into any transaction which would operate to deprive it of any of the rights and powers necessary to perform any or all of the covenants herein made . . . .

12. The Sponsor will keep up to date at all times an airport layout plan of the Airport showing . . . Such airport layout plan, and each amendment, revision, or modification thereof, shall be subject to the approval of the FAA, which approval shall be evidenced by the signature of a duly authorized representative of the FAA on the face of the original layout plan. The Sponsor will not make or permit the making of any changes or alterations in the Airport or any of its facilities other than in conformity with the airport layout plan as so approved by the FAA, if such changes or alterations might affect the *safety*, utility, or efficiency of the Airport.

13. Insofar as it is within its power and to the extent reasonable, the *Sponsor will take action to restrict the use of land adjacent to or in the immediate vicinity of the Airport to activities and purposes compatible with normal airport operations including landing and takeoff of aircraft.*"

Plaintiff's Complaint was filed on February 20, 1974, and DeKalb County, Georgia, and the individual commissioners served their Answer to plaintiff's Complaint

on April 15, 1974. Defendant DeKalb County, Georgia, moved the district court to strike certain paragraphs from plaintiff's Complaint and simultaneously moved the district court to dismiss plaintiff's Complaint for failing to state a claim upon which relief could be granted. By Order of the district court dated June 27, 1974, defendant's Motion to Strike was denied and defendant's Motion to Dismiss was granted. The Motion for Reconsideration and to set aside said Order and Judgment was denied by the district court by Order dated September 24, 1974. Appeal was taken to the United States Court of Appeals for the Fifth Circuit, and the appeal was heard by a panel of judges, Morgan, Godbold and Dyer. Judge Morgan wrote the majority opinion which affirmed the district court as to its dismissal of plaintiff's Complaint on the basis of negligence and nuisance but held that the plaintiff had stated a claim as a third-party beneficiary of the grant agreement between the United States of America and DeKalb County, Georgia. Defendants then moved the Court for a rehearing en banc which was granted resulting in the Court of Appeals affirming the holding of the district court in all respects by Order entered August 25, 1976. Of the 13 members of the en banc court, seven adopted Judge Dyer's dissent from the panel opinion as the opinion of the Court, one member of the Court concurred, and five members of the Court, including the chief judge, dissented in an Opinion by Judge Morgan.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it erroneously interprets the applicability and content of federal common law on a question of great and re-

curring significance relating to the rights of private litigants in claims arising out of a third-party beneficiary interest in contracts with agencies of the federal government. It is further encumbent upon this Court to review the decision of the Court below to settle discrepancies between courts of appeal in other circuits and conflicts of the opinion of the Court below with prior rulings of this Court.

1. The Decision of the Court Below is in Conflict with other Decisions from the same and Other Circuits.

Petitioner contends that the holding in the Court below that the petitioner is not entitled to sue as a third-party beneficiary to Grant Agreements is in direct conflict with several cases that have dealt with similar issues of fact and law.

In the original decision of the Court of Appeals below, the Court held that the plaintiffs were intended beneficiaries of the Grant Agreements and that, as such, the plaintiffs could maintain the present action against DeKalb County, Georgia. In the decision on the rehearing en banc, the majority of the Court held that federal law was applicable to the interpretation of the Grant Agreements and that the plaintiff was not entitled to recover as a third-party beneficiary.

This petitioner contends that the holding of the Court below is in direct conflict with other cases and other circuits. One case in apparent direct conflict with the Opinion of the Court below in the case at bar is the case of *City of Inglewood v. City of Los Angeles*, 451 F.2d 948 (9th Cir., 1972). In the *City of Inglewood* case, the Ninth Circuit determined that Grant Agreements under the Federal Aviation Acts were intended for the

benefit of local residents and users of the airports, both with respect to flight safety and the welfare of persons living nearby the airport. A third-party beneficiary action was allowed in the *Inglewood* case without serious consideration being given to whether federal or state law was being applied. The decision in the *City of Inglewood* case is in direct conflict with that of the Court below.

Certainly, the most similar case to that at bar is the case of *Rapp v. Eastern Air Lines, Inc.*, 264 F.Supp. 673 (E.D.Pa., 1967). Such case also involved the crash of a jet aircraft as a result of the ingesting into the plane's engines birds which were permitted to exist at a garbage dump adjacent to the airport property. The Court in *Rapp* held that airport users are, in fact and in law, third-party beneficiaries of the Grant Agreements such as those involved in the instant case and are entitled to sue the party breaching such covenants.

The decision of the Court below is in conflict with its own decision in *Bossier Parish School Board v. Lemon*, 370 F.2d 847 (5th Cir., 1967). In that case, black children who were not allowed to attend the Bossier, Louisiana public schools were allowed to sue as third-party beneficiaries under a contract between the United States of America and the Bossier Parish School System.

Petitioner contends that a direct conflict exists between the decision of the Court below in the instant case and the cases above-cited. The issues in conflict are of potentially far-reaching importance, and, therefore, review is needed to settle such conflict.

2. The Majority Opinion of the Court below Erroneously Applies Federal Common Law Rather than the Property Applicable State Law.

Several analogous Supreme Court cases exist which conflict with the decision of the Court below as to the applicability of Federal Common Law. *Bank of America Nat. T. & S. Assoc. v. Parnell*, 352 U.S. 29 (1956) involves a question as to whether in litigation between two private parties concerning Government bonds. The Court held that state law controlled.

In *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63 (1966), the Supreme Court held that state law applies to a case between private parties with respect to assignment of a mineral lease on land belonging to the Federal Government. In rejecting the application of Federal Common Law, the Supreme Court held:

> "Because we find no significant threat to any identifiable federal policy or interest, we do not press on to consider other questions relevant to invoking federal common law, such as the strength of the state interest in having its own law govern. . . ."

The instant case, like the *Parnell* case and the *Wallis* case, involves litigation between private parties with only a peripheral involvement of the Federal Government. There is no issue directly affecting the rights and liability of the Federal Government. Unlike the *Wallis* and *Parnell* cases, however, in the instant case, the effect of applying Federal Common Law is to thwart the aims and purposes of the Federal Government as stated in the Grant Agreements between the Federal Government and DeKalb County and in the Federal Airport and Airway Development Act, 49 U.S.C. §1701, *et seq.*

It is clear in the instant case that if the law of the State of Georgia is applied, the plaintiff would be allowed to proceed against DeKalb County as a third-party beneficiary of the Grant Agreements between the Federal Government and DeKalb County. By applying Federal Common Law to the third-party beneficiary questions, the Court below has extended to DeKalb County governmental immunity greater than that provided within the laws of its own State.

In view of the foregoing conflicts with the decision of the Court below, there appears to be a need for review in order that the rights of private litigants arising out of a contract to which the United States is a party might be clarified. We submit that the proper test should be whether the rights and duties of the Federal Government will be subject to uncertainty if state law is applied. *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1973). Clearly, in the instant case, the different states' laws could not be more restrictive than the Federal Common Law applied by the Court below. Since the application of Federal Common Law extends additional immunity to the County, the incentives to the County to maintain a safe airport are lessened. Any uncertainty could affect only the counties to the benefit of the public and would not subject rights and duties of the Federal Government to uncertainty.

3. The Majority Opinion of the Court below Expands Federal Question Jurisdiction.

As noted by Judge Morgan's dissent from the majority opinion of the en banc Court of Appeals, the holding of the majority that Federal Common Law controls the entire interpretation of any contract entered into by the United States could result in the

expansion of federal question jurisdiction.

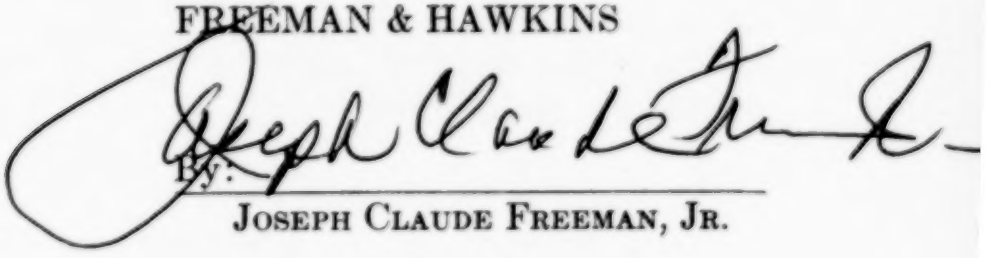
Although the issue has never been decided by the Supreme Court, Judge Morgan's dissent notes that the "better view" is that cases arising under Federal Common Law are within the original jurisdiction of the Federal Courts as a federal question case. The majority opinion would, therefore, give rise to federal question jurisdiction in each and every question of interpretation of a contract involving the United States regardless of whether the rights and duties of the United States would be affected and regardless of the United States' interest in having its own law apply.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be granted to review the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

FREEMAN & HAWKINS



By: _____

JOSEPH CLAUDE FREEMAN, JR.

CERTIFICATE OF SERVICE

I hereby certify that I have made service of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit by depositing a copy of same in the United States mail with sufficient postage affixed thereto, addressed to each of the following:

MR. RONALD R. GLANCZ
Appellate Section, Civil Division
U. S. Department of Justice
Washington, D. C. 20530

MR. GEORGE M. FLEMING, Trial Attorney
Torts Section, Civil Division
U. S. Department of Justice
Washington, D. C. 20530

MR. WILLIAM D. MALLARD, JR.
Assistant U. S. Attorney
Post Office Box 912
Atlanta, Georgia 30301

MR. MEADE BURNS
Long, Weinberg, Ansley & Wheeler
3000 The Equitable Building
Atlanta, Georgia 30303

MR. J. ARTHUR MOZLEY
Smith, Cohen, Ringel, Kohler, Martin & Lowe
2400 First National Bank Tower
Atlanta, Georgia 30303

MR. WENDELL K. WILLARD
Harvey, Rhodes & Willard
125 Trinity Place
Decatur, Georgia 30030

This 22 day of November, 1976.

JOSEPH CLAUDE FREEMAN, JR.
Attorney for Petitioner

APPENDICES

APPENDIX A

GEORGE HENSON MIREE, et al.,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, et al.,
Defendants-Appellees.

JUDITH ANITA PHILLIPS, widow of
David Emanuel Phillips, deceased,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Third-Party Plaintiff-Appellee.

DEKALB COUNTY, GEORGIA,
Defendant-Appellee,

v.

MACHINERY BUYERS CORP., et al.,
Third-Party Defendants-Appellees.

WILLIAM MICHAEL FIELDS,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee,

DEKALB COUNTY, GEORGIA, et al.,
Defendants-Appellees.

FIREMAN'S FUND INSURANCE COMPANY,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee,

DEKALB COUNTY, GEORGIA, et al.,
Defendants-Appellees.

PEARLIE CHAISSON,
Plaintiff-Appellee,

v.

SOUTHEAST MACHINERY, INC.,
Defendant and Third-Party Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, et al.,
Third-Party Defendants-Appellees.

Nos. 74-3670, 74-3822, 74-3864, 74-3870 and 74-3881.

United States Court of Appeals, Fifth Circuit.

Aug. 25, 1976.

Persons injured, and representatives of persons killed, when a jet aircraft crashed after takeoff, allegedly because of ingestion in the jet engines of a large number of birds swarming over the airport and in adjacent county garbage dump, brought diversity damage actions against the county. The United States District Court for the Northern District of Georgia at Atlanta, William C. O'Kelley, found the county immune from suit and dismissed the actions, and plaintiffs appealed. After the judgment was reversed by a panel of the Court of Appeals, with one circuit judge dissenting, 526 F.2d 679, the court en banc granted rehearing and, although adopting the majority panel opinion in other respects, held, in agreement with the dissenting member of the panel, that federal law, not state law, controlled in determining whether plaintiffs were third-party beneficiaries under a contract between the county and the Federal Aviation Administration under which the county assured safe operation of the airport and surrounding properties controlled by it.

Affirmed.

Tjoflat, Circuit Judge, concurred and filed opinion.

Lewis R. Morgan, Circuit Judge, dissented and filed opinion in which Brown, Chief Judge, and Goldberg, Ainsworth, and Godbold, Circuit Judges, joined.

Brown, Chief Judge, dissented and filed opinion.

Courts 372(4)

Federal common law, not state law, applied in determining whether, in diversity damage actions brought for deaths and injuries which occurred when jet aircraft crashed after ingesting birds swarming over airport and adjacent county garbage dump, persons injured and representatives of persons thus killed were entitled to recover damages as third-party beneficiaries under contracts between county and Federal Aviation Administration under which county assured safe operation of airport and surrounding properties controlled by it; there being nothing in Federal Airport Act, under which county's agreement with FAA had been executed, or in agreement itself, to indicate intent to compensate members of public injured through use of airport, recovery under third-party beneficiary theory was unavailable under federal law. (Syllabus taken from dissent of Dyer, Circuit Judge, 526 F.2d at 686).

Appeals from the United States District Court Northern District of Georgia.

Before BROWN, Chief Judge, GEWIN, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, MORGAN, CLARK, RONEY, GEE, TJOFLAT and HILL, Circuit Judges.*

* Because of illness Judge Wisdom did not participate in the hearing or in the consideration of this case. Judge Thornberry was a

PER CURIAM:

The Court en banc adopts as its opinion Parts I, II, and IV of the majority panel opinion in this cause, 526 F.2d 679-686. The Court en banc adopts as its opinion the dissenting opinion of Judge Dyer, 526 F.2d 686-688 in lieu of Part III of the majority panel opinion. While not directly in point, the Court has reviewed the case of *United States v. Orleans*, ___ U.S. ___, 96 S.Ct. 1971, 48 L.Ed.2d 390. The reasoning of the dissenting opinion, adopted here, is remarkably consistent with the policy considerations noted by the Chief Justice in *Orleans*.

Accordingly, the judgment of the district court is AFFIRMED.

TJOFLAT, Circuit Judge (concurring).

I agree that, in general, government contracts, and especially those having to do with the airways, should be controlled by federal law. *See generally Illinois v. Milwaukee*, 406 U.S. 91, 92 S.Ct. 1385, 31 L.Ed.2d 712 (1972); *United States v. Seckinger*, 397 U.S. 203, 90 S.Ct. 880, 25 L.Ed.2d 224 (1970); *Northwest Airlines v. Minnesota*, 322 U.S. 292, 64 S.Ct. 950, 88 L.Ed. 1283 (1944); *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974), *cert. denied sub nom., Forth Corp. v. Allegheny Airlines, Inc.*, 421 U.S. 978, 95 S.Ct. 1979, 44 L.Ed.2d 470 (1975). *See also* Federal Aviation Act of 1958, §1108(a), 49 U.S.C. §1508(a) (1970). I also agree that the public was not an intended third-party beneficiary of the contract assurances mandated by 49 U.S.C. §1110, *now enacted at* 49 U.S.C. §1718 (1970). Consequently, I concur.

LEWIS R. MORGAN, Circuit Judge, with whom JOHN R. BROWN, Chief Judge, and GOLDBERG,

member of the En Banc court that heard oral arguments but due to illness did not participate in this decision.

AINSWORTH and GODBOLD, Circuit Judges, join (dissenting):

The court *en banc* adopts as its decision Parts I, II, and IV of the majority panel opinion, which held that under Georgia law plaintiffs could not recover against defendant DeKalb County under a theory of negligence,[1] of nuisance, or of waiver of immunity through the County's purchase of liability insurance. The majority *en banc* also adopts Judge Dyer's dissent in the original panel opinion in lieu of Part III of that same opinion. In Part III, the majority panel opinion held that under Georgia law plaintiffs could sue as third-party beneficiaries to a contract between the Federal Aviation Administration (FAA) and DeKalb County. Through its adoption of Judge Dyer's dissent, however, the majority *en banc* holds that suit as third-party beneficiaries is likewise unavailable to plaintiffs and that, accordingly, their entire action was properly dismissed.

DeKalb County entered into an agreement with the FAA whereby in return for a grant of money by that agency, it gave the FAA certain assurances, among which were its promises that it would operate the airport for the use and benefit of the public, maintain it in a safe and serviceable condition, and limit use of adjacent land so that it would not interfere with the safe use of the airport. *Miree v. United States*, 5 Cir., 526 F.2d 679 at 686, n.12. The majority panel opinion held that under Georgia law plaintiffs could sue as third-

[1] While plaintiffs presented abundant evidence to make out a prima facie case of negligence against defendant in the operation of the DeKalb-Peachtree Airport, an analysis of applicable Georgia case law indicated that DeKalb County was immune from suit under a theory of negligence.

party beneficiaries for the County's alleged breach of its contractual duties.[2] Judge Dyer's dissent, which the court *en banc* now adopts, argued that federal common law, not Georgia law, should control the interpretation of third-party beneficiary rights under a contract entered into by the United States Government and other parties. We respectfully dissent.

I. Inapplicability of Federal Common Law.

After *Erie R. R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), in which the Supreme Court held that in diversity cases [3] state law generally shall apply, it became clear that federal general common law no longer existed. Yet, with the much publicized *Clearfield Trust Co. v. United States*,[4] 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1973), it became clear that federal common law, as opposed to federal *general* common law, still lived. In *Clearfield*, a check drawn on the United States Treasurer payable to a named government employee was stolen and forged and the Clearfield Trust Company paid the check over the

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[2] Specifically, through the County's continued operation of the county garbage dump, which lay adjacent to the airport, large numbers of birds swarmed over the airport and created allegedly hazardous conditions. It was the ingestion of a large number of these birds into the air intake system of the airplane's engine that allegedly caused the crash in question.

[3] Justice Brandeis' exact words were: "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state . . . There is no federal general common law." 304 U.S. at 78, 58 S.Ct. at 822.

[4] Actually, on the same day that *Erie* was announced, Justice Brandeis held that "whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110, 58 S.Ct. 803, 811, 82 L.Ed. 1202 (1938).

forged endorsement. In determining that federal common law, not state law, applied, the Supreme Court held that rights and duties of the United States on commercial paper that it issues should not be controlled by local law. That is, "the issuance of commercial paper by the United States is on a vast scale and transactions in that paper . . . will commonly occur in several states. The application of state law . . . would subject the rights and duties of the United States to exceptional uncertainty. . . . The desirability of a uniform rule is plain." *Id.* at 367, 63 S.Ct. at 575. Hence, the rationale supporting the *Clearfield* decision is that when the rights and duties of the United States are to be determined, uniformity of result is desirable. *Accord, United States v. Standard Oil*, 332 U.S. 301, 67 S.Ct. 1604, 91 L.Ed. 2067 (1947) (indemnification of Government for injury to its soldier is matter of federal fiscal policy that demands uniform result).

It seems quite clear to us then that absent explicit Congressional command, federal common law should be chosen in a diversity case only when there exists an identifiable federal interest in the outcome of the particular case or in a consistent result in cases of its class. Such an interest is not involved in this case. Here, we have litigation between two non-federal parties over the rights of one as a third-party beneficiary to a contract executed by the other. While the federal government was a party to this contract, it has no particular interest in the outcome of the third party beneficiary question in this diversity suit.[5] Such a question is a matter to be

[5] To the extent that the United States would have any interest in the outcome, its interest would favor recovery by the plaintiffs, in that the United States required the County to promise to maintain safe conditions at the airport. Unless the United States intended

decided by the particular state's own contract law. Indeed, whether or not the plaintiffs could recover as third-party beneficiaries is of no significance to the United States in that it affects no rights or liabilities of the United States[6] and involves no impact on a federal fiscal policy.[7]

We find our approach supported by analogous Supreme Court cases. In *Bank of America National Trust & Savings Association v. Parnell*, 352 U.S. 29, 77 S.Ct. 119, 1 L.Ed.2d 93 (1956), a diversity case in which the United States was not a party, the Supreme Court held that in litigation between two private parties over negotiation of federal bonds, state law controlled. The words of Justice Frankfurter are particularly appropriate for the present case:

> The present litigation is purely between private parties and does not touch the rights and duties of the United States. The only possible interest of the United States in a situation like the one here . . . is that the floating of securities of the United States might somehow or other be adversely affected by the local rule of a particular State regarding the liability of the converter. *This is far too speculative, far too remote a possibility to justify the application of a federal law to transactions essentially of local concern.*

Id. at 33-34, 77 S.Ct. at 121. (Emphasis added.) Likewise, in *Wallis v. Pan American Petroleum Corporation*, 384 U.S. 63, 86 S.Ct. 1301, 16 L.Ed.2d 369 (1966), the Supreme Court held that state law applies to a case

this to be an empty promise by the County, one would assume that it would favor a result encouraging the keeping of this promise. See Section II, infra.

[6] *Clearfield Trust Co. v. United States, supra.*

[7] *United States v. Standard Oil, supra.*

between two private parties involving the assignment of an oil and gas lease given by the United States through the Mineral Leasing Act for Acquired Lands. In rejecting the application of federal common law, the Court stated:

> In deciding whether rules of federal common law should be fashioned, normally the guiding principle is that a significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown. It is by no means enough that, as we may assume, Congress could under the Constitution readily enact a complete code of law governing transactions in federal mineral leases among private parties. Whether latent federal power should be exercised to displace state law is primarily a decision for Congress. Even where there is related federal legislation in an area, as is true in this instance, it must be remembered that 'Congress acts . . . against the background of the total corpus juris of the states . . .' Hart & Wechsler, The Federal Courts and the Federal System 435 (1953). Because we find no significant threat to any identifiable federal policy or interest, we do not press on to consider other questions relevant to invoking federal common law, such as the strength of the state interest in having its own rules govern. . . .
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> * * * * * *
>
> Finally, *it is said that because the leases are issued by the United States and concern federal lands, there is a federal interest in having private disputes over them justly resolved. Apart from the highly abstract nature of this interest, there has been no showing that state law is not adequate to achieve it.*

Id. at 68-71, 86 S.Ct. at 1304, 16 L.Ed.2d at 373-74 (emphasis added). We find the present case to be analogous to both *Parnell* and *Wallis*. Like *Parnell* and

Wallis, this case involves litigation between private parties over a matter in which the federal government has been somewhat involved, but in which no issue of the rights and liability of the government is being litigated and in which no federal interest demanding a uniform disposition is involved.[8]

In addition to these Supreme Court precedents, we feel that there are several policy considerations that favor application of state law over federal common law in this case. First, there is the important consideration of comity between the state and federal governments deemed so important in *Erie*. As the Supreme Court has stated: "As respects the creation by the federal courts of common-law rights, it is perhaps needless to state that we are not in the free-wheeling days antedating *Erie R. R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188. *The instances where we have created federal common law are few and restricted.*" *Wheeldin v. Wheeler*, 373 U.S. 647, 651, 83 S.Ct. 1441, 1445, 10 L.Ed.2d 605, 611 (1963) (emphasis added) (citation omitted). Here there exists a ready-made body of Georgia law on contract law, a subject well-disposed to adjudication through state law.[9]

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[8] Indeed, the three cases cited by Judge Dyer for the proposition that federal common law should apply involved situations in which the United States was either seeking indemnity or was itself suing for damages on a contract made between it and another party. *See Miree v. United States*, *supra*, at 686. Hence, in these cases the United States did have an identifiable interest in the outcome of the case that demanded an application of federal common law.

[9] We note that in several instances, the Supreme Court has applied state law in a suit brought in federal court for the reason that the matter is one of particular state concern and one on which the state has already developed a large body of law. For example, in *United States v. Yazell*, 382 U.S. 341, 86 S.Ct. 500, 15 L.Ed.2d 404 (1966), a suit brought by the United States to obtain payment of a loan made by the Small Business Administration, the Supreme

Second, we find the result in this case cruelly ironic in that through the application of federal common law, the majority preserves the County's immunity from suit by imposing a stricter test for third-party beneficiary standing than Georgia's own courts do. In view of the fact that the United States has enacted a complex scheme of federal aviation laws whose purpose is to promote air safety and that the Government in its contract with DeKalb County demanded assurances that the latter would maintain the airport in a safe condition, we cannot understand what federal purpose can possibly be served by conferring on DeKalb County greater immunity than its own state laws give it.

Finally, there is one other possible ramification of the case that could prove to be an unpleasant surprise for my brothers who join in the majority opinion: the expansion of federal jurisdiction. There was some concern that our holding in the original panel opinion expanded federal jurisdiction, that, carried to its logical conclusion, it would result in making a "federal case" out of a minor slip and fall accident at a county airport. The basis of that fear always seemed unclear, in that the present case is a diversity case, not a "federal question" case in which a particular holding could well expand

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Court applied state law on the issue of the female defendant's disability to contract, noting that the state had developed a body of law on the issue in question and that, absent an overriding federal interest, the state's interest in the matter should be respected. *Id.* at 352, 86 S.Ct. at 507, 15 L.Ed.2d at 410. Although the jurisdictional basis for it was the existence of a federal question, *DeSylva v. Ballentine*, 351 U.S. 570, 580-81, 76 S.Ct. 974, 979-80, 100 L.Ed. 1415, 1427-28 (1956), is in accord (state law, not federal law, determines the meaning of "children" under § 24 of the Copyright Act of 1947). We feel that the interest of the state in applying its own law governing third-party beneficiary rights is equally compelling.

federal jurisdiction.[10] Therefore, whether we had held that Georgia law did or did not render the County liable on a third-party beneficiary theory, the case was nevertheless a diversity case whose particular holding could not possibly expand or contract federal jurisdiction. Through the majority's holding that federal common law controls the entire interpretation of any contract entered into by the United States, however, it is quite possible that federal jurisdiction has been expanded. This is, "though the matter remains undecided by the Supreme Court, the better view is that a case 'arising under' federal common law is a federal question case, and is within the original jurisdiction of the federal courts as such." *C. Wright, Law Of Federal Courts* 250 (2d ed. 1970). Since Mr. Wright's statement, the Supreme Court has held that claims founded on federal common law shall be construed as claims arising under the Constitution, laws or treaties of the United States, for purposes of federal question jurisdiction under 28 U.S.C. §1331. *Illinois v. City of Milwaukee*, 406 U.S. 91, 92 S.Ct. 1385, 31 L.Ed.2d 712 (1972). Accordingly, it would seem that with this court's *en banc* decision there is now federal question jurisdiction over any claim made as a third-party beneficiary to a contract involving the United States—a result that gives a much broader jurisdictional base than the present diversity basis alone.

For the above reasons, we believe the original panel opinion applying Georgia law to the question should be affirmed.

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[10] *E. g., Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

II. Third-Party Beneficiary Suits Under Federal Common Law.

While we do not believe that federal common law should apply in this case, we also dissent from the majority's holding that such federal law would preclude plaintiffs' suits as third-party beneficiaries. Judge Dyer cites the *Restatement (First) Of Contracts*, §145 (1932) and seven cases—none of which derives from either the Supreme Court or this circuit—for the proposition that members of the public can recover damages under a contract with the United States to which they are not a party only when the contract manifests an intention that they be so compensated. *Miree v. United States, supra*, at 686-87. We contend that this authority is not persuasive in that the Restatement, now forty-four years old, antedates most of the major development of the third-party beneficiary doctrine and that the seven cases cited are inapplicable to the present case.[11] Two cases out of the Fifth and Ninth Circuits that are much closer to the present case sup-

[11] None of these cases seem particularly applicable to the facts of this case. In two of the cases—*West v. Morrison-Knudsen Company*, 451 F.2d 493 (9th Cir. 1971) and *Hensley v. United States*, 279 F.Supp. 548 (D. Mont. 1968)—the courts were utilizing *Montana* third-party beneficiary law. *Brotherton v. Merritt-Chapman and Scott Corp.*, 213 F.2d 477 (2d Cir. 1954), does not clearly state whether it is applying federal or state law, but, in any event, that case involved an incidental beneficiary. *Mahler v. United States*, 306 F.2d 713 (3rd Cir. 1962), was a tort case, not a third-party beneficiary action. Two cases that disallowed third-party suits—*Johnson v. Redevelopment Agency*, 317 F.2d 872 (9th Cir. 1963) and *Sayre v. United States*, 282 F.Supp. 175 (N.D. Ohio 1967)—were limited to the facts of their case, facts which included a comprehensive federal statutory scheme on redevelopment that precluded such suits. Finally, *Housing Corp. of America v. United States*, 468 F.2d 922, 199 Ct.Cl. 705 (U.S. Ct.Cl. 1972), denied a third-party beneficiary action because the United States had fulfilled its duty under the contract and because a section of the contract explicitly prohibited third-party beneficiary actions.

port our argument that federal common law should favor plaintiffs' recovery. In *Bossier Parish School Board v. Lemon*, 370 F.2d 847 (5th Cir. 1967), this court held that black children who were not allowed to attend the Bossier, Louisiana public schools could sue as third-party beneficiaries under a contract between the United States and the Bossier Parish school system. Specifically, the United States Department of Health, Education, and Welfare had administered grants of two million dollars to the Bossier Parish school system, for which the school system gave various promises in return, among them the assurance that children of parents stationed at Barksdale Air Force Base could attend the public schools; the black children discriminated against in *Bossier* were children of such parents. Because *Bossier* was brought as a federal question suit, it is clear that the panel was applying federal common law when it held that the assurances given by the defendant in return for the United States grants made permissible a third-party beneficiary suit by plaintiffs.

In a case even closer factually to the present case, the Ninth Circuit held that plaintiff, an adjacent city to the defendant airport, had standing to sue as a third-party beneficiary to grant agreements made between an airport and the FAA. *City of Inglewood v. City of Los Angeles*, 451 F.2d 948 (9th Cir. 1972). In that case, plaintiff, who alleged federal question grounds, sued for damages and injunctive relief arising from noise that resulted from operation of the Los Angeles International Airport. Reversing the district court in its holding that plaintiff could not sue as a third-party beneficiary in that it was not an intended beneficiary of the grant agreement, the Ninth Circuit examined the legislative history of 49 U.S.C.A. §1110(4) [now 49 U.S.C.A.

§1718(4)],[12] pursuant to which the grant agreement was executed, and found that flight safety was not the sole purpose of the section, but that the welfare of persons living close to airports was also to receive protection. The court stated:

> If Los Angeles made the assurances required . . . in applying for various grant agreements, then Inglewood must certainly be included within the category of intended beneficiaries of those assurances. *Congress had some purpose in enacting these two sections of Title 49. It is not to Los Angeles' benefit to be required to give the Secretary those assurances; nor are the assurances of any independent benefit to the Secretary.* The Secretary merely receives them for the benefit of, and in the place of, the surrounding communities and residents of the area.

Id. at 956 (emphasis added). Of course, the facts in the present case do involve flight safety, as opposed to noise disturbance, but the Ninth Circuit's discussion in Inglewood makes it quite clear that such safety was the primary object sought by the grant assurances. Just as in *Inglewood*, in this case, it was not for the benefit of DeKalb County nor for the benefit of the FAA that the government required the County to promise that it would maintain the airport in safe operating condition. Obviously, the only parties that the assurance could possibly have benefited were those members of the

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[12] That section reads:

> As a condition precedent to his approval of an airport development project under this subchapter, the Secretary shall receive assurances in writing, satisfactory to him, that—
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> (4) appropriate action . . . has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including landing and takeoff of aircraft.

flying public who used DeKalb-Peachtree Airport. Accordingly, we contend that under federal common law plaintiffs were the intended beneficiaries of the grant agreement and should have been allowed to so sue.

III. Conclusion.

In summary, we feel that regardless of which law should be applied in this case, the result reached here is clearly incorrect. We have in this case plaintiffs suing a fully insured County against whom a strong prima facie case of negligence and breach of contract have been made. Under our interpretation of Georgia law, the law which we believe to be applicable here, plaintiffs could sue as third-party beneficiaries to the grant agreement between the United States and DeKalb County.[13] We feel that the same result should obtain under application of federal common law. Yet, the majority applies a federal common law narrower in its allowance of recovery than Georgia law, the forum that should have the greater interest in determining whether its county should be immune from suit. In the face of a contract provision enacted at the insistance of the United States that requires DeKalb County to maintain a safe airport and of an extensive scheme of federal aviation laws whose purpose is to encourage safe airport operations, we cannot understand what federal interest is served by overruling Georgia law to defeat an action by these plaintiffs. We respectfully dissent.

JOHN R. BROWN, Chief Judge (dissenting):

I join in Judge Morgan's fine dissent. I have reservations about part I but these are not decisive of this case.

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[13] *Hancock County v. Williams*, 230 Ga. 723, 198 S.E.2d 659 (1973).

I emphasize that I believe federal, not state, law controls. This is an area in which there is a need for that consistency which can only be provided by uniform national standards—a consistency, in short, which requires the application of federal construction of federal contracts. Like Judge Morgan, however, I believe that federal law not only does not preclude the plaintiffs below from recovering as third-party beneficiaries but that federal law compels this result.

To assert that Congress, in enacting 49 U.S.C.A. §1718(4), meant for contracts between the FAA and airports to benefit that countless multitude of taxpayers and land-locked citizens and to exclude those of the flying public—including peripatetic Judges whose airborne safety is central to them—is to say Congress was incongruous. Who else but the flying public—with or without life tenure (which after all lasts for this life only)—were they thinking of? The proof of the pudding, as this record indicates, is that the Federal Government, disturbed about the presence of garbage fed fowls, sought and obtained from the District Court an injunction against the continuance of this menace. In what name was this remedy invoked—in the name of the safety of the air traveling public. If the Government could, should, and did protect them from this hazard to their very temporal existence, how in the name of legalese can we conclude that the contract did not mean that fliers—or unfortunately, their successors, assigns, widows and orphans—while protected in a general sense, were not to be entitled to the only redress an aggrieved survivor has for such a contractual dereliction?

APPENDIX B

GEORGE HENSON MIREE, et al.,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, et al.,
Defendants-Appellees.

JUDITH ANITA PHILLIPS, widow of
David Emanuel Phillips, deceased,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Third-Party Plaintiff-Appellee.

DEKALB COUNTY, GEORGIA,
Defendant-Appellee,

v.

MACHINERY BUYERS CORP., et al.,
Third-Party Defendants-Appellees.

WILLIAM MICHAEL FIELDS,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee,

DEKALB COUNTY, GEORGIA, et al.,
Defendants-Appellees.

FIREMAN'S FUND INSURANCE COMPANY,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee,

DEKALB COUNTY, GEORGIA, et al.,
Defendants-Appellees.

PEARLIE CHAISSON,
Plaintiff-Appellee,

v.

SOUTHEAST MACHINERY, INC.,
Defendant and Third-Party Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, et al.,
Third-Party Defendants-Appellees.

Nos. 74-3670, 74-3822, 74-3864, 74-3870 and 74-3881.

United States Court of Appeals, Fifth Circuit.

Jan. 30, 1976.

Persons injured, and representatives of persons killed, when a jet aircraft crashed after takeoff, allegedly because of ingestion in the jet engines of a large number of birds swarming over the airport and an adjacent county garbage dump, brought diversity damage actions against the county. The United States District Court for the Northern District of Georgia, at Atlanta, William C. O'Kelley, Judge, found the county immune from suit and dismissed the actions, and the plaintiffs appealed. The Court of Appeals, Lewis R. Morgan, Circuit Judge, held that the county was immune from suit on theories of negligence or maintenance of a nuisance, but that it was not immune from liability on a theory that plaintiffs were third-party beneficiaries to a contract between the Federal Aviation Administration and the county under which the county agreed to operate the airport safely.

Reversed.

Dyer, Circuit Judge, dissented and filed opinion.

1. Counties 143

Under Georgia law, county was immune from suit for property damage and personal injuries and death occurring when jet aircraft crashed shortly after takeoff because of ingestion of large number of birds swarming over airport and adjacent county garbage dump, to extent that suits were founded on theory that operation of garbage dump continued with knowledge of presence of birds and their interference with aircraft on prior occasions, and was therefore negligent. Code Ga. §§11-201 et seq., 23-1502, 69-301, 72-103.

2. Counties 141

Georgia statute, providing that if public nuisance causes special damage to individual, such special damage shall give right of action, does not create statutory exception to general rule of county immunity; rather, statute's function is to create cause of action for particular type of nuisance. Code Ga. §§23-1502, 72-103.

3. Counties 143

Under Georgia law, county was immune from liability under theory of nuisance for personal injuries, death and property damage occasioned when jet aircraft crashed shortly after takeoff from airport due to ingestion in jet engines of large number of birds swarming over airport and adjacent county garbage dump. Code Ga. §§23-1502, 69-301, 72-102, 72-103, 105-103; Const. Ga. art. 1, §3, par. 1.

4. Counties 208

Under Georgia law, if statute authorizes county to contract, it also implicitly creates cause of action for

breach which is not barred by statute conferring county immunity. Code Ga. §23-1501.

5. Contracts 187(1)

Under Georgia statute permitting actions on contracts by third-party beneficiaries, such actions are limited to intended beneficiaries, as distinguished from incidental beneficiaries. Code Ga. §3-108.

6. Contracts 187(1)

Under Georgia law, contract with public body confers benefit on public if it is clear from appropriate contractual provisions that parties intended those provisions to benefit public. Code Ga. §3-108.

7. Counties 208

Under Georgia law, county was not immune from suit for personal injuries, death and property damage occurring when jet aircraft crashed after ingestion in jet engines of birds flying over county garbage dump adjacent to airport, to extent that suit sought recovery by plaintiffs as third-party beneficiaries under contract between county and Federal Aviation Administration under which county assured safe operation of airport and surrounding properties controlled by it. Code Ga. §§3-108, 23-1501.

8. Counties 141
Insurance 608.1

Under Georgia law, purchase of liability insurance by county, even if policy contains explicit clause prohibiting insurance company from pleading immunity of county, neither waives immunity of county from suit

nor creates direct action against insurer. Code Ga. §23-1502.

9. Counties 141

To extent county was otherwise immune from suit, purchase by county of liability insurance policy created no cause of action against it. Code Ga. §23-1502.

Appeal from the United States District Court for the Northern District of Georgia.

Before GODBOLD, DYER and MORGAN, Circuit Judges.

LEWIS R. MORGAN, Circuit Judge:

On February 26, 1973, a Lear Jet crashed shortly after take-off from the DeKalb-Peachtree Airport. The alleged cause of the crash was the ingestion of a large number of birds swarming over the airport and adjacent county garbage dump. Damage was substantial; all passengers were killed, the plane was destroyed, an individual on the ground was severely injured by burning jet fuel that fell from the disabled plane shortly before crashing, and property at the crash site was extensively damaged. Separate actions were brought by the passengers' survivors,[1] the burn victim,[2] the owner of the plane,[3] and the owner of the property at the crash site.[4] The various plaintiffs, suing in diversity, asserted

[1] In No. 74-3670, George Henson Miree, Claude Estes Miree, and Dorothy Estes Miree sue as survivors to their parents, Mr. and Mrs. Richardson F. Miree. In No. 74-3822, Judith Anita Phillips sues as survivor to her husband, David E. Phillips.

[2] No. 74-3864, *William Michael Fields v. DeKalb County, Georgia.*

[3] In No. 74-3870, Fireman's Fund Insurance Co. sues as assignee to Southeast Machinery's claim for destruction of the Lear Jet.

[4] No. 74-3881, *Pearlie Chaisson v. Southeast Machinery, Inc.*

theories of negligence, nuisance, and breach of contract. Defendant DeKalb County moved to dismiss on grounds that it was immune from suit under Georgia Law. Defendant's motion was granted, and the plaintiffs appealed.

I.

[1] The plaintiffs present a prima facie case of negligence that would certainly survive a motion to dismiss in the absence of any immunity question. The essence of their claim is that large numbers of birds had flocked around the garbage dump adjacent to the airport for a considerable period of time, that the county was aware of the bird problem prior to the crash, and that birds had interfered with planes on prior occasions. All this, of course, is to no avail if counties are immune from being sued in negligence. Relying heavily on three cases, the plaintiffs contend that counties are not immune from negligence suits. First, they argue that the Uniform Airports Law (UAL)[5] was held to constitute a statutory waiver of *municipal* immunity in *Caroway v. City of Atlanta*, 85 Ga.App. 792, 70 S.E.2d 126 (1952), a case involving airport negligence. Next, they cite *Southern Airways v. DeKalb County*, 102 Ga.App. 850, 118 S.E.2d 234 (1960), for the proposition that suits may be maintained against counties for breach of contract under the UAL, because operation of an airport is a proprietary function. Finally, they tie up the argument with a quotation from *Taylor v. King*, 104 Ga.App. 589, 122 S.E.2d 265 (1961), to the effect that for immunity purposes there is no distinction between municipalities and counties in cases involving airports authorized under the UAL. We must conclude, how-

[5] Ga. Code Ann. § 11-201 *et seq.*

ever, that when read in context of the surrounding case law and statutory framework, these cases stand for much narrower propositions.

An examination of the statutory bases of immunity for counties and municipalities reveals distinctly different provisions. County immunity is provided for in Ga. Code Ann. §23-1502. "A county is not liable to suit for any cause of action unless made so by statute." While almost as succinct in its language, the provision for municipal immunity in Ga. Code Ann. §69-301 is not nearly so unequivocal. "Municipal corporations shall not be liable for a failure to perform, or for errors in performing, their legislative or judicial powers. For neglect to perform, or for improper or unskillful performance of their ministerial duties, they shall be liable."

The operational distinction between these statutes has long been recognized by the Georgia courts. The second sentence of the municipal immunity statute has been consistently read to waive immunity whenever a municipality undertakes a proprietary function. Thus, in *Ware County v. Cason*, 189 Ga. 78, 79, 5 S.E.2d 339 (1939), the Georgia Supreme Court held a county hospital immune to suit even though prior cases had found no immunity for city hospitals.

> There is a statute which, on the basis of distinction between governmental functions of municipal corporations and ministerial acts, inhibits municipal liability for damages flowing from breach of duty in regard to the former, and imposes municipal liability for breach of duty in regard to the latter. Code, §69-301; *Cornelisen v. Atlanta*, 146 Ga. 416 (91 S.E. 415). But there is no such statute relating to counties and no statute making

> a county liable to suit for tort based on negligence in operating a hospital causing injury to a pay patient therein.

Accord, *Purser v. Dodge County*, 188 Ga. 250, 251-52, 3 S.E.2d 574 (1939).

It follows that the requirements for resisting immunity in cases involving municipal and county airports is significantly different. To sue a municipal airport, a plaintiff need only show that the operation of a municipal airport is a proprietary function; to sue a county airport, a plaintiff must show an express statutory waiver of immunity. When read in light of this distinction it becomes apparent that the extensive discussion of the UAL in *Caroway v. City of Atlanta*, 85 Ga. App. 792, 70 S.E.2d 126 (1952), was not intended to demonstrate that the statute waived immunity. Rather, the intent was to demonstrate that, despite language in the UAL which could have been read to say that the operation of airports is a governmental function, the operation of an airport is a proprietary function, and, accordingly, is susceptible to suit.

In *Southern Airways v. DeKalb County*, 102 Ga.App. 850, 118 S.E.2d 234 (1960), the court made considerable use of the proprietary function discussion in *Caroway*, but not, as suggested by the plaintiff, for the purpose of finding either that the UAL constitutes a statutory exception or that the county participation in a proprietary function waives immunity. Rather, the purpose of the court's inquiry into whether the operation of an airport constituted a proprietary function was to fit this case within the framework of a line of Georgia cases that allow County Commissioners to enter into binding contracts extending beyond their term of office only if

the contract relates to a proprietary function of the county. *Id.* at 854-855, 118 S.E.2d 234.

On motion for rehearing the court in *Southern Airways* clarified its position as to the county's lack of immunity from suit on the contract. The court ruled that since the UAL expressly authorizes the county to contract, the logical inference of that statute is that the county may be sued for breach of contract. This is consistent with several other Georgia decisions which hold that statutory authority to contract is necessarily a statutory waiver of immunity to suit for breach. *Hancock County v. Williams,* 230 Ga. 723, 198 S.E.2d 659 (1973); *Deason v. DeKalb County,* 222 Ga. 63, 148 S.E.2d 414 (1966).

Finally, an examination of *Taylor v. King,* 104 Ga. App. 589, 122 S.E.2d 265 (1961), reveals that the language relied upon by the plaintiffs was taken out of context. The *Taylor* case involved alleged negligence by a municipal airport. Accordingly, it was necessary for the plaintiffs to demonstrate that operation of the airport was a proprietary function to avoid immunity. Relying on the *Caroway* and *Southern Airways* cases, the court concluded that the operation of this municipal airport was a proprietary function. In the course of its discussion of the *Southern Airways* case the court said: "For this purpose, there is no distinction between municipal and county liability." The antecedent to which "this purpose" refers is not, however, determination of immunity, as suggested by the plaintiffs, but only determination of whether or not an airport is a proprietary function.[6] An examination of the Uniform

[6] *See also, City of Macon v. Powell,* 133 Ga. App. 907, 908, 213 S.E.2d 63 (1975).

Airports Law reveals no language that even vaguely suggests that the legislature intended to waive county immunity for negligence in the operation of airports. Having been cited no other statutory authority, we necessarily must conclude that the county is immune from suit on theory of negligence.

II.

The second theory propounded by the plaintiffs is that the county is liable for special damages resulting from the maintenance of a nuisance. The district court overruled this theory, holding that in the absence of statutory authority to be sued, the county is immune under Ga. Code Ann. §23-1502. In response, the plaintiffs assert that the requisite statutory authority to sue exists in Ga. Code Ann. §72-103.

> Generally, a public nuisance gives no right of action to any individual. If a public nuisance shall cause special damage to an individual, in which the public did not participate, said special damage shall give a right of action.

In addition, they cite several Georgia cases holding a county liable for maintenance of a nuisance.

[2] Although several Georgia cases have held either a municipality or a county liable for a nuisance, none has cited §72-103 as its authority for not holding the county immune. We could read this statute to create an exception to immunity only if we read "public nuisance" to mean a nuisance created or maintained by a public body. Ga. Code Ann. §72-102, however, defines public and private nuisance in terms of who is affected and who is injured, not in terms of the perpetrator of the nuisance. Thus, it must be concluded, that §72-103 does

not create a statutory exception to the general rule of immunity. Rather, its function, like several comparable Georgia statutes,[7] is to create a cause of action for a particular kind of wrong.

There are, nevertheless, circumstances under which a county may be sued in nuisance. In both *Nalley v. Carroll County*, 135 Ga. 835, 70 S.E. 788 (1911), and *DeKalb County v. McFarland*, 223 Ga. 196, 154 S.E.2d 203 (1967),[8] counties were held liable for flood damage caused by a county public works project. Neither case, however, made clear its basis for finding the counties susceptible to suit. In *Baranan v. Fulton County*, 232 Ga. 852, 209 S.E.2d 188 (1974), the Georgia Supreme Court clarified the situation. The counties were not immune in those cases because Article 1, §3, para. 1 of the Georgia Constitution[9] provides that private property shall not be taken for public purposes without just and adequate compensation. The effect of the flooding was to take the plaintiffs' land for public purposes, thus creating an action for compensation under the Constitution, and accordingly, an exception to §23-1502.[10]

[3] The injuries that occurred to the plaintiffs in the present case do not parallel those of the plaintiffs in *Baranan*, *McFarland*, or *Nalley*. In those cases land was rendered useless as the incidental result of a public project; the taking was an inevitable result of the public

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[7] *See, e. g.*, Ga. Code Ann. § 105-103 which creates a cause of action for an ordinary tort.

[8] *See also*, later opinions in the *McFarland* case at 224 Ga. 618, 163 S.E.2d 827 (1968); 226 Ga. 321, 175 S.E.2d 20 (1970); 231 Ga. 649, 203 S.E.2d 495 (1974).

[9] Ga. Code Ann. § 2-301.

[10] *Accord Williams v. Ga. Power Co.*, 233 Ga. 517, 519, 212 S.E.2d 348 (1975).

project, and the county knew or should have known that flooding would occur. The action was for compensation for land, the taking of which was necessary to the completion of the project. In this case, the injury to property resulting from the air crash is not a necessary and foreseeable consequence of maintaining a garbage dump and, consequently, not comparable to the flooding that results from river and drainage projects. Thus, we must conclude that there is no statutory exception under which these plaintiffs may sue the county for nuisance.

We reach this conclusion despite a line of cases that hold municipalities liable for personal injuries resulting from a continuing nuisance. *Town of Ft. Oglethorpe v. Phillips*, 224 Ga. 834, 165 S.E.2d 141 (1968); *City of Blue Ridge v. Kiker*, 189 Ga. 717, 7 S.E.2d 237 (1940); *City Council of Augusta v. Cleveland*, 148 Ga. 734, 98 S.E. 345 (1919); *City of Gainesville v. Pritchett*, 129 Ga. App. 475, 199 S.E.2d 889 (1973).[11] These cases allow municipalities to be held liable in nuisance despite §69-301. While the cases do not explain why the municipalities are not immune, it is clear from several opinions that it is not because they fall within the exception for proprietary functions. Instead, this line of cases must be read to be a common law exception to the general statutory rule expressed in §69-301 that municipalities are immune. Such an exception cannot be created for counties, because §23-1502 explicitly requires that exceptions to immunity be created by statute. In accord with this reading of *Town of Ft. Oglethorpe v. Phillips, supra*, is *Sheley v. Board of Public Education for City of Savannah and County of Chatham*, 132 Ga.App. 314, 317-18, 208 S.E.2d 126 (1974), *aff'd*, 233 Ga. 487, 212 S.E.2d 627 (1975), in which the Georgia Court of Ap-

[11] *See also* Annot., 34 A.L.R.3d 1008, 1044-49 (1970).

peals declined to apply the immunity exception of the *Ft. Oglethorpe* case to cases in which governmental subdivisions other than municipalities were sued in nuisance. See also, *Williams v. Ga. Power Co.*, 233 Ga. 517, 519, 212 S.E.2d 348 (1975). Accordingly, we hold that these cases do not create a cause of action in nuisance against counties.

III.

[4] Finally, the plaintiffs seek to sue the county as third-party beneficiaries to a contract between the Federal Aviation Administration (FAA) and DeKalb County. That contract provided for, among other things, the safe operation of the airport and surrounding properties controlled by the county. The district court rejected this claim, holding that counties are immune from suit for breach of contract. In support of that conclusion they cite *Purser v. Dodge County*, 188 Ga. 250, 3 S.E.2d 574 (1939). That case, however, never reached the question. "The question certified does not involve a determination as to whether a county would be liable on a contract which the law might expressly or impliedly authorize it to make." *Id.* at 253, 3 S.E.2d at 575. It is now a well settled proposition of Georgia law that if a statute authorizes a county to contract, it also implicitly creates a cause of action for breach. Since the action against the county is authorized by statute, it is not barred by §23-1501. *Hancock County v. Williams*, 230 Ga. 723, 724, 198 S.E.2d 659 (1973); *Deason v. DeKalb County*, 222 Ga. 63, 65, 148 S.E.2d 414 (1966); *Decatur County v. Prayton, Howton and Wood Contracting Company*, 163 Ga. 929, 933-34, 137 S.E. 247 (1927); *Southern Airways Co. v. DeKalb County*, 102 Ga.App. 850, 865, 118 S.E.2d 234 (1960) (on motion for rehearing). Since it is clear that DeKalb

County may be sued for breach of contract, the only remaining question is whether the plaintiffs may sue as third-party beneficiaries to the contract between DeKalb County and the FAA.

[5] Actions on contracts by third-party beneficiaries are explicitly provided for by Ga. Code Ann. §3-108 ". . . the beneficiary of a contract made between other parties for his benefit may maintain an action against the promisor on said contract." The case law interpreting this statute has, however, limited its application to intended beneficiaries, as distinguished from incidental beneficiaries. Compare *Robinson Explosives, Inc. v. Dalon Contracting Co.*, 132 Ga.App. 849, 851-52, 209 S.E.2d 264 (1974), with *Stewart v. Gainesville Glass Co.*, 131 Ga.App. 747, 752-53, 206 S.E.2d 857 (1974), *aff'd*, 233 Ga. 578, 212 S.E.2d 377 (1975). A typical situation under which a third-party beneficiary cannot sue is presented by *Lee v. Petty*, 133 Ga.App. 201, 210 S.E.2d 383 (1974). In that case the plaintiffs attempted to sue Ware County under a contract between the county and a leasing company that required the county to obtain liability insurance. Merely because the plaintiffs would benefit from the existence of an insurance policy was not sufficient. The court held that "[w]ithout question there was no contemplation that the appellants [would] be beneficiaries under the terms of the contract and hence there is no basis for their recovering under this case." *Id.* at 206, 210 S.E.2d at 386. Since the purpose of the insurance clause was not to protect the public, but to determine responsibilities and liabilities between the parties, injured members of the public could not sue.

[6] The remaining question, therefore, is whether the

safety provisions in the contract between DeKalb County and the FAA were intended to benefit the public. The county argues that such a showing is not sufficient; not only must the parties have intended to benefit the public, but they also must have intended to compensate members of the public who are injured as a result of a breach. Under Georgia law, however, it is well settled that a contract with a public body confers a benefit on the public if it is clear from the appropriate contractual provisions that the parties intended those provisions to benefit the public.

In *Smith v. Ledbetter Brothers, Inc.*, 111 Ga.App. 238, 141 S.E.2d 322 (1965), the defendant had entered into a road building contract with the state of Georgia. Included in that contract was an agreement that the defendant would "provide all safeguards, safety devices, and protective equipment and take any other needed actions, on his own responsibility or as the contracting officer may determine, reasonably necessary to protect . . . the safety of the public . . ." *Id.* at 239, 141 S.E.2d at 324. The plaintiff in that case alleged that the defendant was negligent in carrying out his contractual obligation to provide for the safety of the public, and that this negligence had resulted in the plaintiff's injury. The court held that the plaintiff could sue for this breach. "A contract between the State Highway Department and a construction company by which the latter undertakes to provide for the safety of the public during the construction of the work inures to the benefit of the public, and a member of the public injured as a result of negligence in failing to do so may sue the contracting party directly." *Id.* at 240, 141 S.E.2d at 324. Accord *M. R. Thomason and Associates, Inc. v. Wilson*, 125 Ga.App. 658, 661-62, 188 S.E.2d 805 (1972). The

court did not discuss whether the parties contemplated creating a cause of action for the public. The mere creation of a contractual duty for the public's benefit necessarily created a cause of action in the public for its breach.

[7] The situation and contracts presently before the court are quite similar to those in the construction cases. DeKalb County's contract with the FAA provides that the county will operate the airport for the use and benefit of the public, will operate and maintain it in a safe and serviceable condition, and will limit use of adjacent land so that it will not interfere with the safe use of the airport.[12] The county breached this contractual duty, and as a result of that breach the plaintiffs were injured. We hold that these contractual provisions inured to the benefit of the public, and, accordingly, the plaintiffs may sue for breach.

IV.

[8, 9] Some of the plaintiffs also argue that the purchase of an insurance policy by the county creates a cause of action. Georgia law, however, has consistently held that the purchase of liability insurance by a county, even if the policy contains an explicit clause prohibiting the insurance company for pleading the immunity of the county, neither waives the immunity of the county from suit, nor creates a direct action against the insurer. *Arnold v. Walton*, 205 Ga. 606, 611-14, 54 S.E.2d 424 (1949); *Revels v. Tift County*, 235 Ga.

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[12] *See* Project Application, Sponsor's Assurances, paragraphs 2, 6, 7, and 13 (appearing in the appendix of No. 74-3870, *Fireman's Fund Insurance Co. v. United States*, at 80-81). The Project Application is incorporated into the Grant Agreement by reference (appearing in Appendix, *supra*, at 62).

333, 335, 219 S.E.2d 445 (1975); *Lee v. Petty*, 133 Ga. App. 201, 205-06, 210 S.E.2d 383 (1975).

In conclusion, we hold that DeKalb County is susceptible to suit on theory of breach of contract and that all of the plaintiffs may sue as third-party beneficiaries to the contract between DeKalb County and the FAA. All other actions are barred by the immunity of the county. Accordingly, we reverse.

DYER, Circuit Judge (dissenting):

Although I agree with the majority's conclusion that DeKalb County is immune from suit for negligence and nuisance, I disagree with their conclusion that the county can be held liable by plaintiffs as third-party beneficiaries of the Federal Grant Agreement between the United States and the county. At most, plaintiffs are incidental beneficiaries of that agreement, not entitled to recover for breach of contract.

At the outset, the majority errs by looking to Georgia law in determining whether plaintiffs are third-party beneficiaries.[1] Although jurisdiction here is based upon diversity, the contract we are interpreting is one in which the United States is a party, and one which is entered into pursuant to authority conferred by federal statute. The necessity of uniformity of decision demands that federal common law, rather than state law, control the contract's interpretation. *United States v. Seckinger*, 1970, 397 U.S. 203, 90 S.Ct. 880, 25 L.Ed.2d

[1] Even if Georgia law should apply, the result would not be different. The majority recognizes that under Georgia law, only *intended*, and not *incidental* beneficiaries, may recover for breach of contract. As will be shown in this dissent, nothing in the grant agreements or the underlying statutes raises the status of the plaintiffs from incidental to intended beneficiaries.

224; *Smith v. United States*, 5 Cir. 1974, 497 F.2d 500; *First National Bank v. Small Business Administration*, 5 Cir. 1970, 429 F.2d 280.[2]

Federal cases considering the question of when members of the public at large are third-party beneficiaries of a contract to which the United States is a party are few in number. However, those cases support the position of the Restatement of Contracts, §145, that such members of the public can recover damages under a contract with the United States to which they are not a party only when the contract manifests an intention that they be so compensated.[3] *West v. Morrison-Knudsen Company*, 9 Cir. 1971, 451 F.2d 493 (Injured employee of subcontractor is not third-party bene-

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[2] As stated in *Clearfield Trust Co. v. United States*, 1943, 318 U.S. 363, 367, 63 S.Ct. 573, 575, 87 L.Ed. 838:

> The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain.

Even though we are here considering the liability of parties other than the United States, this same consideration controls, for if plaintiffs are third-party beneficiaries with respect to the obligations of the county under the contract, then they would also be third-party beneficiaries with respect to the obligations of the United States.

[3] Restatement of Contracts, §145, provides in pertinent part:

> A promisor bound to the United States or to a state or municipality by contract to do an act or render a service to some or all of the members of the public, is subject to no duty under the contract to such members to give compensation for the injurious consequences of performing or attempting to perform it, or of failing to do so, unless,
>
> (a) an intention is manifested in the contract, as interpreted in light of the circumstances surrounding its formation, that the promisor shall compensate members of the public for such injurious consequences. . . .

ficiary of safety provisions of prime contract between United States and general contractor); *Hensley v. United States*, D.Mont. 1968, 279 F.Supp. 548 (same); *Brotherton v. Merritt-Chapman & Scott Corp.*, 2 Cir. 1954, 213 F.2d 477 (provision in contracts requiring contractors to cooperate with one another was for benefit of government, and contractor could not recover from another as third-party beneficiary of that provision). *See also Johnson v. Redevelopment Agency*, 9 Cir. 1963, 317 F.2d 872; *Mahler v. United States*, 3 Cir. 1962, 306 F.2d 713; *Housing Corp. of America v. United States*, Ct. of Claims 1972, 468 F.2d 922, 199 Ct.Cl. 705; *Sayre v. United States*, N.D. Ohio 1967, 282 F.Supp. 175. It is not enough that the contract confer a benefit on the public at large.

Plaintiffs claim they are third-party beneficiaries of certain broad assurances made by the county and contained in the grant agreement, to the effect that the county will operate the airport safely and will control surrounding airport hazards.[4] However, these contract assurances appear to be nothing more than the assur-

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[4] These assurances provide in pertinent part:

> The Sponsor will operate and maintain in a safe and serviceable condition the Airport and all facilities thereon and connected therewith which are necessary to serve the aeronautical users of the Airport other than facilities owned or controlled by the United States, and will not permit any activity thereon which would interfere with its use for airport purposes.
>
> In addition, the Sponsor will not erect or permit the erection of any permanent structure or facility which would interfere materially with the use, operation, or future development of the Airport, . . .
>
> Insofar as is within its power to the extent reasonable, the Sponsor will take action to restrict the use of land adjacent to or in the vicinity of the Airport to activities and purposes compatible with normal airport operations including landing and takeoff of aircraft.

ances required by 49 U.S.C.A. §1110.[5] I can find nothing in the language of the contract or the legislative history of 49 U.S.C.A. §1110 to indicate that the purpose of these assurances was to create a cause of action on behalf of injured third-parties. In fact, the only remedy provided in the grant agreement for breach of these assurances is termination of the grant by the United States. As in *United States v. Mahler, supra*, it appears that the only purpose of these assurances was to make sure that federal funds were effectively employed and not wasted.

Other courts, in considering third-party claims under the Federal Airport Act, 49 U.S.C.A. §1101 et seq., and the various agreements and assurances entered into pursuant to that act, have concluded that, although the act might incidentally benefit users of airports, both airlines and passengers, the primary purpose of the act was to establish a nationwide system of public airports adequate to meet the present and future needs of civil aviation. *Port of New York Authority v. Eastern Air Lines, Inc.*, E.D.N.Y. 1966, 259 F.Supp. 745; *San Francisco v. Western Air Lines, Inc.*, 1962, 204 Cal. App.2d 105, 22 Cal.Rptr. 216; *Eastern Air Lines v.*

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[5] 49 U.S.C.A. §1110 provides in pertinent part:

As a condition precedent to his approval of a project under this chapter, the Administrator shall receive assurances in writing, satisfactory to him, that

* * * * *

(2) such airport and all facilities thereon or connected therewith will be suitably operated and maintained, with due regard to climatic and flood conditions;

(3) the aerial approaches to such airport will be adequately cleared and protected by removing, lowering, relocating, marking, or lighting or otherwise mitigating existing airport hazards and by preventing the establishment or creation of future airport hazards;

Town of Islip, 1962, Sup., 229 N.Y.S.2d 117. There is nothing to indicate an intent to compensate members of the public injured through the use of the airport.

The majority finds that "not only must the parties have intended to benefit the public, but they also must have intended to compensate members of the public who are injured as a result of a breach." I find no support for the second conclusion. It is based not on the language of the contract or the legislative history, but merely on a relatively few state cases which, as outlined above, are not controlling. I am unwilling to create a cause of action based on such a thin thread. I would therefore affirm the judgment of the district court.

APPENDIX C

[Filed in Clerk's Office Sept. 25, 1974,
Ben H. Carter, Clerk; By: P.J.E., Deputy Clerk.]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JUDITH ANITA PHILLIPS, widow of David Emanuel Phillips, deceased,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant and Third-Party Plaintiff,

vs.

MACHINERY BUYERS CORP. and SOUTHEAST MACHINERY, INC.,
Third-Party Defendants.

CIVIL ACTION NO. 19412

ORDER

This action was brought by Judith A. Phillips against the United States of America and DeKalb County, Georgia, for the death of her husband. The United States has filed a third-party claim against Southeast Machinery, Inc. and Machinery Buyers Corporation pursuant to Fed.R.Civ.P. 14. In a prior order of this Court, *Phillips v. United States*, Civ. No. 19412 (N.D. Ga., June 27, 1974), DeKalb County was dismissed as a party defendant for plaintiff's failure to state a claim. Fed.R.Civ.P. 12(b)(6). This court rested its decision upon DeKalb County's governmental immunity from suit. The case is now before the court on the motion of third-party defendants Southeast Machinery, Inc. and

Machinery Buyers Corporation to reconsider this ruling.

Briefly stated, the case arises out of an aircraft crash which occurred shortly after takeoff from the DeKalb-Peachtree Airport in DeKalb County, Georgia. All persons aboard the aircraft were killed, including plaintiff's decedent. The complaint alleges that numerous birds swarmed over the airport and adjacent garbage dump maintained by DeKalb County, and that the turbine engines of the aircraft ingested a large number of these birds resulting in the sudden loss of power in both engines and the crash of such aircraft. Based upon these allegations, plaintiff claimed that both the United States and DeKalb County were negligent in the maintenance and operation of the airport. It was further alleged that DeKalb County is liable for a public nuisance in the maintenance of a garbage dump near the airport and that plaintiff as a third-party beneficiary may recover for DeKalb County's breach of a contract with the United States in failing to adequately maintain the airport for the benefit of the public. To these claims DeKalb County filed a motion to dismiss, which this court granted. Although various arguments were raised by the parties, the court determines the basic issue to be whether plaintiff's claims are maintainable against DeKalb County in light of the doctrine of governmental immunity.

Pursuant to statutory authority, counties in Georgia enjoy the cloak of governmental immunity. *See Seymore v. Elbert County*, 116 Ga. 371 (1902). Ga. Code §23-1502 provides that "[a] county is not liable to suit for any cause of action unless made so by statute." Consistent with this statute, the Georgia courts have

required parties filing suit against a county to show the appropriate statutory authority allowing a claim. As was stated in *Millwood v. DeKalb County*, 106 Ga. 743 (1899):

> The county, being a political division of the state is not liable to be sued, unless special authority can be shown, and it is incumbent upon the person filing the suit to bring his case within the legislative authority upon which he relies to bring suit.

Id. at 747. Notwithstanding this interpretation, the movants, relying upon *Caroway v. City of Atlanta*, 85 Ga.App. 792 (1952), *Taylor v. King*, 104 Ga.App. 589 (1961), and *Southern Airways Co. v. DeKalb County*, 102 Ga.App. 850 (1960), urge this court to adopt the view that a county can be held accountable when acting in a proprietary capacity such as DeKalb County's operation of the DeKalb-Peachtree Airport. Although the court sympathizes with this view, it cannot so read the cited cases. Both *Caroway* and *Taylor* involved suits against municipalities which have distinctive liabilities not applicable to counties. *Ware County v. Cason*, 189 Ga. 78 (1939). This distinctive liability is set forth in Ga. Code §69-301 which provides that municipalities shall be liable for "improper or unskillful performance of their ministerial duties. . . ." *See generally Troup County Electric Membership Corp. v. Georgia Power Co.*, 229 Ga. 348 (1972). Neither the statutes or Georgia courts have made such a distinction between governmental and proprietary functions with respect to a county's liability under facts such as are presented here. As was clearly stated in *Ware County v. Cason*, 189 Ga. 78, 79 (1939):

> There is a statute which, on the basis of distinction between governmental functions of municipal

> corporations and ministerial acts, inhibits municipal liability for damages flowing from breach of duty in regard to the former, and imposes municipal liability for breach of duty in regard to the latter. (citations omitted.) But there is no such statute relating to counties and no statute making a county liable to suit for tort based on negligence in operating a hospital. . . .

Movants further argue that in *Southern Airways* the Georgia court is moving away from the traditional doctrine of governmental immunity. The court cannot agree. *c.f. Crowder v. Department of State Parks*, 228 Ga. 436 (1971); *see Sheley v. Board of Public Education for the City of Savannah and the County of Chatham*, No. 49044 (Ga.Ct.ofApp. 1974). Although there is some language in *Southern Airways* which supports this position, the case involved merely a declaration of rights of the parties under a lease agreement. This is a reiteration of the rule set out in *Decatur County v. Prayton, Howton & Wood Contracting Co.*, 163 Ga. 929 (1927), that

> [w]henever a county . . . is authorized by statute to contract, and in pursuance of such power does contract, then an action will lie against it to enforce such liability . . . although there is no statute authorizing the bringing of an action for such purpose.

Id. at 934.

This court also finds that movants' reliance upon *DeKalb County v. McFarland*, 223 Ga. 196 (1967), is misplaced. *McFarland* fell within the Georgia constitutional provision holding a county liable for damage to private property taken for public uses, *see* Ga. Code §2-301; *Smith v. Floyd County*, 85 Ga. 420 (1890), and

is distinguishable. Accordingly, the court reaffirms its prior holding that plaintiff's claim of damages resulting from the alleged nuisance fails to set forth a claim against DeKalb County. *State Highway Department v. Barrett*, 124 Ga.App. 703 (1971); *Crowder v. Department of State Parks*, 228 Ga. 436 (1971); *Sheley v. Board of Public Education for the City of Savannah and the County of Chatham*, No. 49044 (Ga.Ct.ofApp. 1974).

For the foregoing reasons, the motion of Southeast Machinery, Inc. and Machinery Buyers Corporation to set aside the prior order dismissing DeKalb County having been considered, it is hereby DENIED.

Inasmuch as the question of DeKalb County's liability to suit involves a controlling question of law upon which the respective liabilities of the parties rest, and there appear to be substantial grounds for differing opinions, an immediate appeal from this order will materially advance the ultimate determination of the litigation. For this reason, the court sees no just reason for delay and directs the Clerk to enter final judgment dismissing DeKalb County from this case.

IT IS SO ORDERED this 24th day of September, 1974.

/s/ WILLIAM C. O'KELLEY
WILLIAM C. O'KELLEY
United States District Judge

APPENDIX D

[Filed in Clerk's Office June 27, 1974,
Ben H. Carter, Clerk; By: J.W.E., Deputy Clerk.]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JUDITH ANITA PHILLIPS, Widow of David Emanuel Phillips, deceased vs. UNITED STATES OF AMERICA and DeKALB COUNTY, GEORGIA	CIVIL ACTION NO. 19412

ORDER

This action was brought by Judith A. Phillips against the United States of America and DeKalb County, Georgia for the death of her husband, David E. Phillips. Jurisdiction exists in the action against the United States pursuant to the Federal Tort Claims Act, 28 U.S.C. §1346(b),[1] and in the action against DeKalb County pursuant to 28 U.S.C. §1332.[2] The case is now

[1] 28 U.S.C. § 1346(b) provides in part:

> [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or admission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

[2] 28 U.S.C. § 1332 provides in part: "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds $10,000 . . . and is between—(1) citizens of different states. . . ."

before the Court upon the United States' motion for leave to file a third-party complaint and a motion to consolidate this action with the case of *Miree v. United States*, Civ. No. 19293 (N.D. Ga., filed Nov. 5, 1973), presently pending in this Court. Also before the Court is DeKalb County's motion to strike portions of the complaint and to dismiss the plaintiff's claims against it. Fed.R.Civ.P. 12(f) and 12(b)(6).

The case arises out of an aircraft crash which occurred shortly after takeoff and approximately two miles southwest of the DeKalb-Peachtree Airport in DeKalb County, Georgia. All persons aboard were killed, including plaintiff's decedent, who was employed as a co-pilot aboard the aircraft. A short time after the crash, there were found the remains of several dead birds near the end of the airport runway from which the aircraft departed. Also discovered were numerous birds swarming over the airport and the adjacent garbage dump, maintained by defendant DeKalb County. The complaint alleges that the turbine engines of the aircraft ingested a large number of these birds, resulting in the sudden loss of power in both engines and the crash and total destruction of said aircraft. The plaintiff claims that the United States, through its agency, the Federal Aviation Administration, and defendant DeKalb County, knew of the existing bird hazard at the airport, in that, such bird hazard had existed for a substantial period of time prior to the crash. Notwithstanding this knowledge, defendants failed to warn and notify jet pilots of the dangerous and unsafe bird hazard that was in existence and negligently failed to take adequate precautions and safeguards to prevent birds from contacting flying aircraft. Based upon these allegations, the plaintiff claims

that both the United States and DeKalb County were negligent in the maintenance and operation of the airport. It is further alleged that DeKalb County is liable for a public nuisance in the maintenance of a garbage dump near the airport and that plaintiff as a third-party beneficiary may recover for breach of a contract with the United States in failing to adequately maintain the airport for the benefit of the public.

I. MOTION TO CONSOLIDATE

The defendant United States has moved the Court pursuant to Fed.R.Civ.P. 42(a)[3] to consolidate the instant action with *Miree v. United States*, Civ.No. 19293 (N.D. Ga., filed Nov. 5, 1973), for purposes of discovery and trial on the issue of liability. Both cases involve questions concerning the open garbage dump at the airport, the operation of the airport, certain formal agreements between the United States (FAA) and DeKalb County concerning operation of the airport, the bird hazard at the airport, and the crash of the Lear jet on February 26, 1973. Nevertheless, plaintiff has objected to consolidation for trial purposes because of possible prejudice to her case. Plaintiff does not object to consolidation for discovery purposes.[4]

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[3] Fed.R.Civ.P. 42(a) provides:

> When actions involving a common question of law or fact are pending before the Court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

[4] There is now pending in this Court five additional cases related to the Lear Jet crash near DeKalb-Peachtree Airport on February 26, 1973: (1) *United States of America v. A. C. Guhl*, Civ. No. 17968 (N.D. Ga., 1973), which involves an attempt by the United States to prohibit DeKalb County from continuing to maintain a hazard near an airport in the form of a garbage dump; (2) *Miree*

Based upon a full consideration of both cases, the Court concludes that it will follow its normal procedure of deferring decision on consolidation for trial purposes until the pretrial conference of this case. In this manner, the Court can be more fully aware of the effect such a ruling will have and whether it will best serve the convenience of the parties and the Court by eliminating unnecessary repetition of evidence. This procedure also insures that the rights of the parties will not be prejudiced by a premature order of consolidation. *See generally Dupont v. Southern Pacific Co.*, 366 F.2d 193 (5th Cir. 1967), *cert. den.* 386 U.S. 958 (1967). The Court does believe though, that since, there are common questions of law and fact involving liability in both cases, and no objection appearing, consolidation will be ordered for purposes of discovery and other pretrial matters.

II. MOTION TO ADD A THIRD-PARTY COMPLAINT

The United States has moved this Court for leave to file a third-party complaint against Machinery Buyers Corporation and Southeast Machinery, Fed.R.Civ.P. 14(a). In support of the motion it is claimed that if the United States is found liable for all or part of the claims asserted by the plaintiff herein, the proposed third-

v. United States of America, Civ. No. 19293 (N.D. Ga., filed Nov. 5, 1973), which involves wrongful death claims filed by the children of two passengers aboard the aircraft; (3) *Fireman's Fund Insurance Company v. United States of America*, Civ. No. C74-24A (N.D. Ga., filed Jan. 8, 1974), which involves a property damage claim filed by the insurer of the Lear jet to recover for the total destruction of the aircraft; (4) *William Michael Fields v. United States of America, et al.*, Civ. No. C74-291A (N.D. Ga., Feb. 20, 1974), which involves a person entering his automobile and burned by the crash of the Lear jet; (5) *Chaisson v. Southeast Machinery, Inc.*, Civ. No. 74-915A (N.D. Ga., filed May 10, 1974), which involves damage to the property where the Lear jet crashed.

party defendants would be liable to the United States either through indemnification or contribution. It appears from the record that no objection has been raised by any party to the proposed third-party complaint. Pursuant to Local Court Rule 91.2 such "[f]ailure to file a response shall indicate that there is no opposition to the motion." Accordingly, with no opposition appearing, the Court grants the requested leave to file the third-party complaint subject to any defenses which may be raised by the third-party defendants.

III. MOTION TO STRIKE

Defendant DeKalb County has moved to strike various paragraphs of plaintiff's complaint for failing to state a claim either in negligence, nuisance, or for breach of contract. The Court particularly notes that defendant's motion to strike is based upon the ground that portions of plaintiff's complaint fail to state a claim upon which relief may be granted. Such a ground for a motion to strike is clearly inappropriate under Fed.R.Civ.P. 12(f).[6] The purpose of rule 12(f) is to simplify and limit the pleadings by an elimination of any "insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." *See Nuccio v. General Host Corp.*, 53 F.R.D. 234 (E.D. La. 1971). The defendant fails to enumerate these grounds in its motion. The substantive arguments made by defendant are more appropriately made in a motion to dismiss under rule 12(b)6 and will be treated as such by the Court. Accordingly, the request to strike is denied.

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[6] See 5 Wright and Miller, Federal Practice and Procedure. § 1380, at 782 (1969) where it is stated: "[Rule 12(f)] is neither an authorized nor a proper way to procure the dismissal of all or part of a complaint. . . ."

IV. MOTION TO DISMISS

The plaintiff's complaint, as it pertains to DeKalb County, bases an alleged right of recovery on the theories of nuisance, negligence, and breach of contract. To these claims DeKalb County has filed a motion to dismiss for failure to state a claim. Fed.R.Civ.P. 12(b)6. Although various arguments are raised by the parties, the Court determines the basic issue to be whether plaintiff's claims are maintainable against DeKalb County in light of the doctrine of governmental immunity as it exists in Georgia. This issue will be discussed in the context of plaintiff's claims.

A. Nuisance

Plaintiff contends that defendants are guilty of the maintenance of a public nuisance—a garbage dump adjacent to and contiguous with the airport; that defendants knew and realized for a significant period of time that said nuisance constituted a hazard to aircraft landing and departing from the airport and; that as a result of said nuisance special damage has been sustained by plaintiff. In response to these contentions the defendant urges that Ga. Code §23-1502 bars any action against a county for maintenance of a nuisance.

Pursuant to statutory authority, counties in Georgia enjoy the cloak of governmental immunity. Ga. Code §23-1502 provides that "[a] county is not liable to suit for any cause of action unless made so by statute." With this statutory basis the Georgia courts have required the party filing suit to show the appropriate statutory authority allowing a claim. As stated in *Millwood v. DeKalb County*, 106 Ga. 743 (1899):

> The county, being a political division of the state

> is not liable to be sued, unless special authority can be shown, and it is incumbent upon the person filing the suit to bring his case within the legislative authority upon which he relies to bring suit.

Id. at 747. *See also Seymore v. Elbert County*, 116 Ga. 371 (1902); *Anderson v. DeKalb County*, 107 Ga.App. 328 (1963); *Ayers v. Franklin County*, 73 Ga.App. 207 (1945). This view was recently reaffirmed in the revised opinion of *Sheley v. Board of Public Education for the City of Savannah and the County of Chatham*, No. 49044 (Ga. Ct..of App., 1974), decided by the Georgia Court of Appeals. In *Sheley* the plaintiff brought suit against the Board of Education for Chatham County to recover for her child's death, allegedly caused by falling into an open septic tank located on school property. In ruling upon a motion to dismiss, the Court, in its revised opinion, refused to allow a nuisance or negligence claim against governmental subdivisicns other than municipalities. This holding appears to be in accordance with the rulings of the Georgia Supreme Court. *cf. Crowder v. Department of State Parks*, 228 Ga. 436 (1971).

Plaintiff's reliance upon *Nalley v. Carroll County*, 135 Ga. 835 (1911) and *DeKalb County v. McFarland*, 223 Ga. 196 (1967), appears to be misplaced. Both cases fall within the Constitutional provision holding a county liable for damages to private property taken for public uses. *See* Ga. Code §2-301. These suits are expressly authorized and fall within the statutory exception provided for in Ga. Code §23-1502, *See Purser v. Dodge County*, 188 Ga. 250 (1939), and are not applicable to the present case.

B. Breach of Contract

Plaintiff, in her complaint, contends that DeKalb County executed six Federal Grant Agreements with the United States. Pursuant to the terms of these agreements DeKalb County obligated itself to perform certain duties with regard to the use and maintenance of the airport, as well as the land adjacent thereto. Plaintiff further averred that DeKalb County violated this agreement by permitting a garbage dump to be maintained in the vicinity of the airport. As a consequence of the breach of this contract, plaintiff's decedent lost his life in an attempt to take off from the airport. Based upon these allegations, plaintiff claims that decedent was a third-party beneficiary to the Grant Agreement and that she may now maintain an action against DeKalb County for breach of contract.

Although the party's briefs discuss the question of the intent of each party to create third-party beneficiary rights, the Court conceives the issue to be much narrower *i.e.* whether sovereign immunity acts as a bar to suit against the county for breach of its contract with the Federal Government. This question appears to have been answered in *Purser v. Dodge County*, 188 Ga. 251 (1939). In *Purser* a question was certified to the Georgia Supreme Court on whether a county was liable in damages to a highway traveler caused by the negligence of the county in performing its contract with the State Highway Department for paving of a highway. *Id.* at 251. The Court after discussing the effect of the doctrine of governmental immunity on suits against counties for their negligence concluded:

> [T]here is no constitutional or statutory provision which can be taken to render a county liable for a

> tort on account of personal injuries arising from a defect in a highway constructed or maintained by the county; and this is true irrespective of whether the construction or repairs of the highway was done in the performance of the county's own governmental functions in maintaining its system of highways, *or whether it was done, as stated in the certified question, under a contract made by the county with the State Highway Department solely for pecuniary gain.* (emphasis added.)

Id. at 252.

Inasmuch as this Court must follow the law of Georgia in this diversity suit, the Court finds that any claim by plaintiffs for damages resulting from the breach of the contract between DeKalb County and the United States is barred by governmental immunity. By so holding, it is unnecessary for the Court to reach the question of whether plaintiff can recover as a third-party beneficiary under the contract in question.

C. Negligence

The plaintiff's remaining claim against DeKalb County is based upon negligence in the operation and maintenance of the DeKalb-Peachtree Airport. As previously discussed with regard to the nuisance allegation, the doctrine of governmental immunity bars this claim. Nevertheless, plaintiff, relying upon *Caroway v. City of Atlanta*, 85 Ga.App. 792 (1952), and *Taylor v. King*, 104 Ga.App. 589 (1961), urges that a county can be held accountable for negligence when acting in a ministerial or proprietary function. Both *Caroway* and *Taylor* involved municipalities which have distinctive liabilities in Georgia not applicable to counties. In *Troup County Electric Membership Corp. v. Georgia*

Power Co., 229 Ga. 348 (1972), this distinction was explained.

> 'Counties are subdivisions of the State Government to which the state parcels its duty of governing the people (citations omitted). They are local, legal, political subdivisions of the State . . . administrating locally the general powers and policies of the State . . . .' On the other hand, municipalities are creatures of the Legislature, and their existence may be established, altered, amended, enlarged or diminished, or utterly abolished by the legislature. *Id.* at 352.

See also Purser v. Dodge County, 188 Ga. 250 (1939); *Sheley v. Board of Public Education for the City of Savannah and the County of Chatham*, No. 49044 (Ga. Ct.ofApp., 1974); *Ware County v. Carson*, 189 Ga. 78 (1939). The Georgia courts have consistently held that the county is an "arm of the state." As such it carries the state's burdens and responsibilities within its respective locality. On the other hand, a municipality, as a legislative creation, can select its available powers, rejecting those liabilities inapplicable to its particular purpose. It is upon this basis that the differing liabilities are based. While it must be conceded that DeKalb County has, by operating an airport, extended its activities into areas beyond its traditional functions, this Court is unable to find that the distinctive classification is unrelated to the purpose of Ga. Code §23-1502 to justify holding DeKalb County liable.

In summary, the Court (1) grants the United States' motion to consolidate this case with *Miree v. United States*, Civ. No. 19293 (N.D. Ga., filed Nov. 5, 1973), for discovery purposes but defers ruling on consolidation for trial purposes until the pretrial hearing of

this case, (2) grants the United States' motion to file a third-party complaint, (3) denies DeKalb County's motion to strike portions of plaintiff's complaint, and (4) grants DeKalb County's motion to dismiss plaintiff's complaint as to its claims of negligence, nuisance and for breach of contract.

IT IS SO ORDERED this 27th day of June, 1974.

/s/ WILLIAM C. O'KELLEY
WILLIAM C. O'KELLEY
United States District Judge